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Attorneys for Defendants
Kellogg Co., Kellogg USA, Inc., Kellogg Sales Co.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SABENA LAKSHMI KAMMULA,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

KELLOGG COMPANY, a Delaware
corporation; KELLOGG USA, INC., a
Michigan corporation; KELLOGG
SALES COMPANY, a Delaware
corporation, and DOES 1 through 100,
inclusive,

Defendants.

No. CV 09-08102 (MMM) (RZx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' *EX PARTE*
APPLICATION TO CONTINUE
HEARING ON PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION**

[*Ex Parte* Application, Proposed Order,
and Declaration of Richard P. Steinken
filed concurrently herewith]

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Kellogg Company, Kellogg USA, Inc. and Kellogg Sales Company respectfully submit this *ex parte* motion to seek a 30-day continuance of the April 12, 2010 hearing date for Plaintiff's motion for class certification. The proposed continuance, if granted, would permit limited but crucial discovery to aid the Court in deciding the class certification motion and would not prejudice the rights of Plaintiff.

Factual and Procedural Background

Counsel for Plaintiff Sabena Lakshmi Kammula filed the first amended complaint on December 9, 2009, claiming that she purchased Defendants' Rice Krispies and Cocoa Krispies in reliance on allegedly inaccurate labeling on the cereal boxes. Defendants filed their answer on January 22, 2010.

Under Local Rule 23-3, Plaintiff's motion for class certification was due within 90 days of service of her complaint. At the request of Plaintiff's counsel, Defendants agreed to enter into a joint stipulation asking that the original deadline for filing a motion for class certification be extended to a date to be determined at the initial status conference set for March 29, 2010. *See* Ex. A; Steinken Decl. ¶ 2.¹

The parties requested an extension of the deadline for filing the motion for class certification in part because "no discovery on the prerequisites of Rule 23 ha[s] occurred," and accordingly "the parties have not had sufficient time to develop an adequate record to move for, or oppose, class certification." *Id.* at 2-3. The Proposed Order was not signed, and Plaintiff's counsel filed the motion for class certification on February 18, 2010. Defendants' opposition brief is currently due March 22, 2010, Plaintiff's reply brief is due March 29, 2010, and the hearing on the motion is scheduled for April 12, 2010. *See* Ex. B.

¹ All exhibit citations refer to exhibits attached to Declaration of Richard P. Steinken ("Steinken Decl.").

Acknowledging the need for pre-certification discovery, Plaintiff's counsel served three sets of interrogatories and document requests on Defendants on March 2. Each set contains 47 specific document requests and 18 interrogatories. Defendants have not yet propounded their discovery requests. Under the Federal Rules, the parties' responses to the various discovery requests will not be due until briefing on the class certification motion has concluded.

Defendants asked Plaintiff's counsel to enter into a stipulation asking the Court to continue the hearing date by 30 days to permit adequate discovery for all parties. Steinken Decl. ¶ 5.² Plaintiff's counsel refused to enter into that stipulation, and instead proposed a two week continuance of the hearing. *Id.* Defendants objected on the grounds that a two week extension would be unfair: It would permit Plaintiff's attorneys to receive responses to their discovery requests prior to the deadline for filing the reply brief, but would not afford Defendants a similar opportunity to have discovery prior to filing their opposition brief. Accordingly, Defendants have filed this *ex parte* motion requesting a 30-day continuance of the hearing on Plaintiff's motion for class certification. Plaintiff's attorneys have said that they will oppose this *ex parte* motion.

Argument

I. Pre-Certification Discovery Is Necessary To Assist The Court In Determining Whether The Requirements Of Rule 23 Have Been Satisfied.

Pre-certification discovery will help this Court determine whether the purported class satisfies the requirements outlined in Federal Rule of Civil Procedure 23. *See Connett v. Justus Enters. of Kansas, Inc.*, 125 F.R.D. 166, 167 (D. Kan. 1988); *see also Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571 (2d Cir. 1982) ("there can be no doubt that it is proper for a district court, prior to certification of a class, to allow

² Lead counsel for Plaintiff is Wayne S. Kreger, of Milstein, Adelman & Kreger, LLP, located at 2800 Donald Douglas Loop North, Santa Monica, California 90405.

1 discovery and conduct hearings to determine whether the prerequisites of Rule 23 are
2 satisfied”); *Gross v. Medaphis Corp.*, 977 F. Supp. 1463, 1475 (N.D. Ga. 1997) (class
3 certification motion denied as premature because parties had not had an opportunity to
4 conduct class discovery).

5 Pre-certification discovery is particularly important in a case, such as this one,
6 where the Court must look beyond the pleadings to determine whether the plaintiff has
7 met her “burden of showing that each of the four requirements of Rule 23(a) and at
8 least one requirement of Rule 23(b) have been met.” *See Coles v. Nyko Techs., Inc.*,
9 247 F.R.D. 589, 592 (C.D. Cal. 2007); *see also Int’l Woodworkers of Am., AFL-CIO*
10 *v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268 (4th Cir. 1981) (“[i]t is
11 seldom, if ever, possible to resolve class representation questions from the
12 pleadings”).

13 Discovery here will assist Defendants in assessing whether Plaintiff can satisfy
14 the Rule 23 requirements, including whether Plaintiff’s claims and defenses are
15 “typical” of the putative class members who purchased Cocoa Krispies and Rice
16 Krispies, and whether Plaintiff will “fairly and adequately protect the interests of the
17 class.” *See Fed. R. Civ. P. 23(a)*. For example, it is especially important to determine
18 whether Plaintiff has any conflicts of interest with the proposed class members
19 because she is the only named class representative. The requested continuance is
20 necessary to ensure that Defendants are provided an opportunity to conduct this
21 essential discovery. *See Coles*, 247 F.R.D. at 592-93 (ordering that plaintiff produce
22 evidence bearing on the “typicality” prong during “class” discovery and before the
23 class certification motion was heard).

24 A district court has discretion to continue a class certification hearing where a
25 defendant has been unable to conduct such discovery prior to the deadline for filing its
26 opposition to the plaintiff’s motion for class certification. *See Clark v. Time Warner*
27 *Cable*, No. 07-1797, 2007 WL 1334965, at *2 (C.D. Cal. May 3, 2007) (explaining
28 that “valid reasons may exist for deferring the certification hearing, such as the need

1 for more time to conduct limited investigation and/or discovery” on Rule 23 issues
 2 and granting defendant’s *ex parte* application for a six week continuance of the class
 3 certification hearing); *Connett*, 125 F.R.D. at 168 (granting a continuance to “allow
 4 defendants to depose plaintiff prior to responding to plaintiff’s motion for class
 5 certification”); *see also* Fed. R. Civ. P. 6(b) (court may, “for good cause” and with or
 6 without motion or notice, extend the deadline for filing opposition or reply papers).

7 Plaintiff’s counsel has acknowledged the appropriateness of conducting pre-
 8 certification discovery in this case. *See* Ex. A at 2-3 (acknowledging that discovery is
 9 necessary to “develop an adequate record” to permit the parties “to move for [and]
 10 oppose class certification”). Defendants agree that discovery will be beneficial to the
 11 parties and will assist the Court in determining whether this action is properly
 12 maintainable as a class action, including whether Plaintiff satisfies Rule 23’s
 13 “adequacy” and “typicality” requirements. *See* Fed. R. Civ. P. 23(a); Civil L.R. 23-3.
 14 Defendants thus respectfully request that the Court continue the hearing to permit
 15 them the opportunity to serve written discovery and depose Plaintiff prior to filing
 16 their opposition to Plaintiff’s motion for class certification.

17 **II. *Ex Parte* Relief Is Necessary Here To Provide Timely And Adequate** 18 **Pre-Certification Discovery.**

19 *Ex parte* relief is appropriate where “the moving party’s cause will be
 20 irreparably prejudiced if the underlying motion is heard according to regular noticed
 21 motion procedures.” *Mission Power Eng’g Co. v. Cont’l Cas. Co.*, 883 F. Supp. 488,
 22 492 (C.D. Cal. 1995). It must also be established that the moving party is without
 23 fault in creating the situation requiring *ex parte* relief, or that the situation occurred as
 24 a result of excusable neglect. *Id.*

25 It is proper for the Court to grant an *ex parte* application in this circumstance.
 26 *See Clark*, 2007 WL 1334965, at *2 (granting defendant’s *ex parte* application for a
 27 six week continuance of the class certification hearing). Defendants’ opposition to
 28 Plaintiff’s motion for class certification is currently due on March 22, 2010, and the

1 hearing on Plaintiff's motion is scheduled to be heard on April 12, 2010. If
2 Defendants were to follow regular motion procedures, the Court would not hear
3 Defendants' motion for a continuance until April 12, 2010, at the earliest (and quite
4 possibly later). *See* L.R. 6-1 (providing that a notice of motion must be filed no later
5 than 28 days before the date set for hearing), 7-3 (requiring parties to meet and confer
6 at least 10 days prior to filing a motion); *see also* CACD Motion Calendar (stating that
7 April 12th, 19th, and 26th are closed for civil motions before Judge Morrow).
8 Defendants will be irreparably prejudiced if, absent *ex parte* relief, the Court rules on
9 Plaintiff's motion for class certification prior to considering Defendant's request for a
10 continuance to permit pre-certification discovery.

11 This short continuance will not prejudice Plaintiff. Indeed, the original
12 stipulation – which Defendants agreed to enter at the request of Plaintiff –
13 contemplated that the Court would not even consider setting a hearing for the class
14 certification motion until the initial status conference on March 29. Defendants only
15 request two additional weeks more than what Plaintiff has offered to avoid the
16 inequitable result of only Defendants not having obtained discovery before submitting
17 their brief. Steinken Decl. ¶ 5. Finally, any delay on the part of Defendants (as well
18 as Plaintiff) in conducting discovery is excusable, given their good-faith belief that
19 Plaintiff's deadline for filing her motion for class certification would be extended to a
20 date following the initial status conference, currently scheduled for March 29, 2010.
21 Steinken Decl. ¶ 7.

22 Conclusion

23 Defendants respectfully request that the Court continue the class certification
24 hearing currently scheduled for April 12, 2010 to May 12, 2010, and order that the
25 deadlines for filing opposition and reply briefs be set for April 21, 2010 and April 28,
26 2010, respectively. A 30-day continuance will permit Defendants the opportunity to
27 serve written discovery and depose Plaintiff prior to filing their opposition to
28 Plaintiff's motion for class certification. In the alternative, if the Court is unavailable

1 on May 12, 2010, Defendants request continuance of the hearing to an alternative date
2 that will afford Defendants the opportunity to conduct pre-certification discovery.

3
4 DATED: March 5, 2010

Respectfully Submitted,

5
6 /s/ Kenneth K. Lee

7 Kenneth K. Lee

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